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No. 92-554

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In The

Supreme Court of the United States

October Term, 1992

JAMES DOYLE FLEENOR, et al.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES; BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; AND UNITED TRANSPORTATION UNION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the grant of summary judgment entered by the district court when the petitioners opposed the motions upon the conclusory allegations of their complaint, had admitted on deposition that the respondent unions had not engaged in any unfair conduct directed to them and that the respondent rail carriers had fulfilled their legal and contractual obligations to them, and failed to produce concrete evidence that respondents unions had colluded with either or both railroad respondents or that respondent unions had engaged in bad faith or discriminatory conduct directed to any petitioner?

2. Whether the Court of Appeals correctly held that the district court did not abuse its discretion in denying petitioners' motions for class certification or for leave to add 184 new plaintiffs as untimely under the district court's agreed scheduling order and the local rules on the basis that the motions were filed over four years after the complaint and three years after completion of discovery and entry of the scheduling order?

3. Whether the Court of Appeals erred in affirming the dismissal of petitioners' claims against respondent Illinois Central Gulf Railroad for alleged violations of protections imposed by the Interstate Commerce Commission on the ground that petitioners had failed to exhaust their mandatory arbitral remedies provided by the Commission to resolve such disputes?

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STATEMENT

In the latter half of the 1970s, the Congress began the process of revitalizing and deregulation of the railroad industry. Congress first adopted the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31. In 1978, it enacted the Revised Interstate Commerce Act. Pub. L. 95-473, 92 Stat. 1337. And on

October 14, 1980. Congress passed the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. These statutory changes significantly altered the administrative process before the Interstate Commerce Commission ("ICC") and the effects of approved and exempted railroad transactions upon employees.

Almost immediately following the statutory changes the ICC took the position that the imposition of employee protection was discretionary. *See Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 658 F.2d 1149, 1169-70 (7th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). Then the Commission adopted a policy of declining to exercise its discretion to impose employee protection in all acquisitions. *See, e.g., Knox & Kane R. Co. – Petition for Exemption*, 366 I.C.C. 439, 443-444 (1982). And shortly after the underlying acquisition involved in this case, the ICC issued a general rule that labor protection would not be imposed upon the seller or buyer of a rail line when the buyer is not an existing rail carrier. *See Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition of Rail Line Under 49 U.S.C. §10901*, 1 I.C.C. 2d 810 (1985). The various Federal Courts of Appeals agreed with the issuance of the class regulation and the Commission's refusal to impose employee protection upon the sale of marginal lines of railroad. *See, e.g., Simmons v. ICC*, 829 F.2d 150 (D.C. Cir. 1987); *Railway Labor Executives' Ass'n v. ICC*, 819 F.2d 1172 (D.C. Cir. 1987); and *Simmons v. ICC*, 760 F.2d 126 (7th Cir. 1985).

In an attempt to stop these sales to noncarriers and to obtain the former levels of employee protection provided by 49 U.S.C. §11347, disgruntled employees have attempted to use the judicial process to do so by filing

various actions against the selling carrier, the acquiring noncarrier and their unions based upon alleged contractual breaches, misrepresentations and purported acts of unfair representation by the employee representatives. This is one of these cases.

This case begins on January 10, 1984, when respondent Illinois Central Gulf Railroad Company ("ICG") agreed to sell its East Mississippi Lines to the respondent Gulf & Mississippi Railroad Company ("G&M"). Among other things, the sales agreement required G&M to employ 210 ICG employees.

On March 16, 1984, G&M filed a petition with the ICC requesting exemption of the acquisition and operation of the East Mississippi Lines from the prior approval requirements of 49 U.S.C. §10901. The respondent unions, the Brotherhood of Locomotive Engineers ("BLE"), the Brotherhood of Maintenance of Way Employes ("BMWE"), the Brotherhood of Railway Carmen of the United States and Canada ("BRC"), the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC"), and United Transportation Union ("UTU"), entered a protest through an umbrella organization, the Railway Labor Executives' Association ("RLEA"), opposing the transaction and requesting, as a matter of law under the Revised Interstate Commerce Act, imposition of employee protective conditions.[1] At least three of the organizations, BLE,

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[1] Since the institution of this suit, ICG has become the Illinois Central Railroad Company, BRAC has been renamed the Transportation Communications International Union, and BRC has become a division of that union. Their former names are used throughout this brief.

BRAC and BRC, filed separate protests. On December 13, 1984, the Commission granted the petition for exemption, and adopted its "long standing and judicially approved policy of not imposing labor protective obligations upon newly formed acquiring carriers," such as G&M, "since the burdens on new operations are great enough without the additional costs of labor protection." *Gulf & Mississippi Railroad Corporation – Purchase Portion – Exemption – Illinois Central Gulf R.R. Co.*, Finance Docket No. 30439.

On January 14, 1985, RLEA filed a petition with the ICC on behalf of its constituent members, including the five union respondents, requesting a stay of its order pending review, and on January 25, 1985, filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. *Railway Labor Executives' Association v. Interstate Commerce Commission*, No. 85-1049 (D.C. Cir.). With the ICC failing to act upon its request for a stay, RLEA requested a stay of the Commission's order from the Court of Appeals on January 31, 1985, which was denied by the court on the following day.

Following the announcement of the sale in January 1984, respondent ICG and each of the unions had entered into negotiations relative to a protective agreement that would provide protection for ICG employees who might be adversely affected by the sale. (*See, e.g.*, R. 950 at ¶¶2, 3).[2] It was not until after the issuance of the Commission's order in December 1984, however, that ICG and the union respondents began to reach agreements known as

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[2] "R" refers to the page of the record as filed with the Court of Appeals.

"Transfer Agreements," Transfer Agreements were reached with BRAC on January 15, 1985; with BRC and UTU on January 16, 1985; with BMWE on January 23, 1985; and with BLE on March 28, 1985.

The agreements between the unions and ICG were essentially the same and provided the following benefits to its employees:

1. ICG promised to guarantee the income of employees as of the date of the sale, who subsequently were deprived of employment or placed in a lower paying job, for a six year period commencing with the date of dismissal or displacement.

2. Employees already covered by the Merger Protection Agreements arising out of the 1972 creation of ICG could choose to accept the Transfer Agreement benefits or the protections contained in the 1973 protective agreements. In addition, those employees taking the benefits under the Transfer Agreements could, at the end of the six-year period, revert to any protection they might have remaining under the Merger Protection Agreements.

3. Employees voluntarily resigning from ICG to accept employment with G&M would receive a severance allowance of $25,000.

The employees were kept advised of the negotiations, and in the case of BLE, for example, the Transfer Agreements were ratified. (R. 726, ¶¶17-19, Ex. S-U; R. 950).

Several months later, on June 12, 1985, the six petitioners, who are or were ICG employees, filed their action, and, on July 2, 1985, filed an amended complaint

purported to be a class action. BRC filed a motion for summary judgment because none of the petitioners was a member of BRC or the craft of railway carmen represented by it. The six remaining respondents filed answers. After completion of discovery, those six respondents also filed motions for summary judgment. (R. 395; R. 511; R. 705; R. 716; R. 886).

On July 21, 1989, more than two years after the filing of these motions, petitioners moved to have the case certified as a class action, notwithstanding the requirements of Fed. R. Civ. P. 23(c)(1), the local court rules, and an agreed upon scheduling order entered by the district court on October 15, 1986. (R. 387; R. 1013).

On May 22, 1990, the district court delivered a bench opinion granting summary judgment for each of the respondent unions on the ground that they had not unfairly represented petitioners. For example, the district court found that petitioner Mitchell, the only named plaintiff who was a member of BLE and a local union officer, admitted that "BLE has not violated any right he may have had or have had under the Merger Protection Agreement and the ICC order, and he further admitted that BLE did not breach its duty of fair representation as he stated that the BLE representatives in negotiating the agreements acted in the best interest of employees represented by BLE and, in fact, did the best they could under the circumstances of the negotiations." Based upon their testimony, similar findings were made with respect to the other petitioners and the unions to which they belonged. As to BRC, the trial court found no named plaintiff to be a member of that union and, therefore, no basis for any claim against it.

The second cause of action, which was against ICG and related to the interpretation, application and enforcement of the protections under the 1973 Merger Protection Agreement and the Transfer Agreements, was held to be a minor dispute, subject to arbitration under the resolution procedures of those agreements. As to the third cause of action, the trial court found that "there was no evidence that G&M did anything other than to buy trackage from ICG," and this was not evidence of its having colluded with the unions and ICG.

Finally, the district court found that the class certification motion did not lie, because "too much time has lapsed from the filing of the complaint until the bringing of these motions" and "the time periods for filing motions expired before these motions were brought." In addition, the court found that petitioners did not pass muster as class representatives, did not have sufficient claims themselves and were not representative of others in the purported class.

Final judgment was entered on September 24, 1990. (R. 1204). A motion to amend the judgment was denied on September 27, 1991. (R. 1254).

Oral argument on petitioners' appeal to the Court of appeals for the Fifth Circuit was held on June 30, 1992. On July 2, 1992, the appellate court entered a judgment and order affirming, *per curiam*, the decision of the district court.

REASONS FOR DENYING THE WRIT

This case involves no question of law that is novel, unique or requires review by this Court in the exercise of its power of supervision. As to the respondent unions, the case involves only the question of whether the Court of Appeals correctly canvassed the record in holding that the unions were properly granted summary judgment, which the district court found an appropriate vehicle for disposition of petitioners' claims because the unions established they had not acted hostilely or irrationally and had not engaged in the discriminatory or bad faith conduct required to establish a breach of the duty of fair representation.

This ruling is consistent with this Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986), and *Celotex v. Catreet*, 477 U.S. 317 (1986), in that the nonmovant petitioners relied on conclusory statements in their pleadings and affidavits, which were prepared after their depositions had been taken, and further failed to meet their burden to produce concrete evidence sufficient "from which a jury might return a verdict in [their] favor."

Moreover, the district court's finding that the unions' actions did not amount to unfair representation is in accord with the decision in *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. ___, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991), in which the Court held in the context of the negotiation of a collective bargaining agreement that the union does not engage in a breach of its fair representation duty unless

its behavior is "so far outside a 'wide range of reasonableness' . . . as to be wholly 'irrational' or 'arbitrary'." 111 S. Ct. 1127, at 1136, 113 L.Ed. 2d at 58. In the instant case, the Transfer Agreements were not a bad settlement to a difficult situation. Rather, the unions clearly acted on rational considerations, having been confronted with loss of jobs and evidence that the era of ICC imposed monetary protections was over. Hindsight establishes that the unions exercised their judgment in a manner by which they obtained jobs which otherwise would have been lost and obtained monetary protections for their members, including severance payments of $25,000 to ICG employees going to work for G&M, that the ICC would not have given. *Ibid.* In addition, the unions kept their members as well informed as possible, and each petitioner acknowledged that his union had not misrepresented or misstated the facts or acted to deceive them. *O'Neill v. Air Line Pilots Ass'n*, 939 F.2d 1199 (5th Cir. 1991) (on remand). In any event, summary judgment was properly granted each of the respondent unions, consistent with the rulings of this Court, because not one of the petitioners suffered any loss of rights under the agreements applicable to him and, therefore, none had a meritorious claim against the union to which they belonged. *Vaca v. Sipes*, 386 U.S. 177 at 187, 193 (1967).

Secondly, the Court of Appeals appropriately respected the district court's exercise of its broad discretion in refusing to permit the case to be maintained as a class action or to include a mass of hundreds of individually named plaintiffs. Petitioners failed to seek class certification "as soon as practicable after the commencement of the action," as required by Fed. R. Civ. P. 23(c)(1), or

within sixty days of the filing of answer as required by the rules of the district court. The need for discovery cannot be considered justification for the delay, since the motion to certify was filed more than four and one half years after commencement of the action and almost three years after discovery was closed in accordance with the scheduling order agreed to by petitioners. That one of the seven respondents, BRC, which did not have a member before the court, filed a motion for dismissal or alternatively for summary judgment, rather than an answer, also does not establish any abuse of discretion by the trial judge that would warrant reversal of the denial of the motion.

In addition, the refusal to certify the class was appropriate in that petitioners were not members of the class they purported to represent and accordingly lacked standing. *General Telephone Co. of the Southwestern v. Falcon,* 457 U.S. 147 (1982). Furthermore, none of the petitioners suffered any injury caused by the unions to which they belong and accordingly could not properly represent a class of persons purporting to have vaguely defined claims against those unions. *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403-404 (1977).

Finally, we note that contrary to petitioners' assertions, the decision below is not in conflict with any decision of the other courts of appeals and presents no question concerning the major-minor dispute dichotomy under the Railway Labor Act which merits this Court's review. Petitioners' argument that the dispute between them and ICG is major is devoid of merit. The responsibility of the court below was merely to determine "whether a claim has been made that the terms of an

existing agreement either establish or refute the presence of a right to take the disputed action." *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 305 (1989). Unless the railroad's "claims are frivolous or obviously insubstantial," the dispute is minor. *Id.*, 307. Once the employer meets the "relatively light burden" it bears, it "may make the change and the courts must defer to the arbitral jurisdiction of the Board." *Id.*, 307, 310.[3] Accordingly, the decision below is consistent with the holdings of this Court and its reading of the Railway Labor Act.

In sum, petitioners' claim is based upon an erroneous view of the Interstate Commerce and Railway Labor Acts and of the appropriate fields for collective bargaining and for arbitration. As a practical matter, the result that petitioners seek would stymie the efficiencies sought by the revised regulatory scheme and further transform the bargaining and negotiation process under the Railway Labor Act into a minefield of unstable labor relations. Moreover, petitioners' assertions do not accurately describe the holding below. That determination, whether or not correctly decided – and respondents believe it was – does not merit this court's attention.

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[3] It must also be pointed out that there is no merit to petitioners' contention that the Transfer Agreements altered or diminished their rights under the Merger Protective Agreements. In fact, the Transfer Agreements expressly recognized and preserved the employees' right to elect coverage under either agreement.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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